80-1981

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in the
Supreme Court
of the
United States

OCTOBER TERM, 1980

JAMES ABRAHAM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether it is fundamentally unfair to permit the government to cross-examine a character witness about an alleged specific instance of misconduct, when claims were made that the allegation was not true and the government had not and could not establish by probative, extrinsic evidence that the misconduct actually occurred?

2. Whether a mistrial should have been granted—or at least a curative instruction given—once it was established that the alleged misconduct asked about in open court had not occurred?

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OCTOBER TERM, 1980

JAMES ABRAHAM,*

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

TO THE HONORABLE CHIEF
JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

Your Petitioner, JAMES ABRAHAM, prays that a writ of certiorari issue to the United States Court of

Appeals for the Sixth Circuit to review its decision entered on the 5th day of March, 1981, affirming his conviction under 18 U.S.C. Section 1952, and 18 U.S.C. Section 371.

*Charles Goldfarb, James Tamer, Edward Monazym, and the Aladdin Hotel Corporation, were also appellants in the case below from which this petition has been taken.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit affirming Mr. Abraham's conviction is reported at 643 F.2d 422 (6th Cir. 1981). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Rule 403, Federal Rules of Evidence:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 405(a), Federal Rules of Evidence:

> Reputation or opinion. In all cases in which evidence of character or trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion.

On cross-examination, inquiry is allowable into relevant, specific instances of conduct.

ADOPTION OF CO-DEFENDANTS' PETITIONS

Petitioner, James Abraham, hereby adopts and incorporates herein by reference, each and every Petition for writ of certiorari filed with this Court by his co-defendants-appellants in the courts below, to review the Sixth Circuit opinion which affirmed his conviction.

STATEMENT OF THE CASE

Nature of the Case and its Disposition

In August of 1978, Petitioner James Abraham was indicted along with Charles Goldfarb, James Tamer, Edward Monazym, and the Aladdin Hotel Corporation, of violating 18 U.S.C. Section 1952 (the "Travel Act"), and of conspiring to violate the Travel Act in violation of 18 U.S.C. Section 371.

The indictment charged Goldfarb and Tamer as having conducted "the ownership, operation, conducting and carrying on of gaming operations of a Las Vegas, Nevada gaming casino, the Aladdin Hotel and Casino" in violation of Nevada statutes and regulations through the use of interstate telephone lines between Detroit, Michigan and Las Vegas, Nevada. Petitioner, James Abraham—the executive vice-president and general manager of the Aladdin Hotel—was charged in a separate count of aiding and abetting the activities of Goldfarb. All of the named defendants were charged in a conspiracy count. On March 13, 1979, Abraham was convicted as charged after a jury trial. (App. A).

Notice of appeal was timely filed and on March 5, 1981, the United States Court of Appeals for the Sixth Circuit affirmed his conviction. (App. B). A timely Petition for Rehearing was filed in the United States Court of Appeals for the Sixth Circuit, (App. C) and on April 1, 1981, the Petition was denied (App. D).

Statement of the Facts

Mr. Abraham sets forth the following facts relative to the issues he separately raises in the instant Petition.

Mr. Abraham's conviction rests solely upon evidence that by extending credit and complimentary privileges ("comps") as part of his duties and responsibilities, as a key employee of the Aladdin Hotel Corporation, he aided and abetted the exercise of control by Goldfarb. This evidence was contained in seven short telephone calls between Mr. Abraham and Mr. Goldfarb, all made in the ordinary course of business. All records and financial entries reflecting such activities, as required by law, were retained and available for review. Absent was any evidence of illegal intent.

Jeffrey Silver, a witness called by the government, testified that the Nevada Gaming Commission recognized the widespread, well accepted method of promoting business by the use of credit extensions and "comps" and left the decision of how and when such promotional methods should be used to the casino owners and certain employees.

In an attempt to seek new customers and references from old customers, the Aladdin Hotel adopted a policy of personal contact between the executives and the customers. Consistent with this policy, Mr. Abraham maintained personal contact with Mr. Goldfarb, who was a valued Aladdin client. Mr. Goldfarb was a heavy gambler at the Aladdin Hotel casino. He had also given the Aladdin Hotel customer references. In fact, the Aladdin Hotel reaped nearly one half million dollars of

profits from Mr. Goldfarb's recommendations. Further, the Aladdin Hotel employed Mr. Goldfarb's bonding agency to write performance bonds for the hotel's entertainment department. Clearly Mr. Abraham's personal conduct with Mr. Goldfarb made good business sense. (Tr. 1344-1356, 1452, 1529, 1533, 1649-1650, 1668, 1703, 2081).

The record in the court below affirmatively demonstrates that all financial records and entries required by law were kept, and there was no concealment from the authorities of extensions of credit or complimentary privileges. (Tr. 1344, 1440-1441).

Standing alone and untampered by improper innuendo, this evidence would have been insufficient to cause a reasonably-minded jury to convict.

The issue Mr. Abraham separately requests this Court to review regards the government's cross-examination at trial of a defense character witness, Carl E. Lovell, Jr. Late in the case, the government irreparably prejudiced Mr. Abraham by injecting the factually incorrect and unsupportable innuendo which caused the jury to find Mr. Abraham guilty.

On February 20, 1979, the government announced at sidebar (Tr. 3239) its intention to inquire upon cross-examination of defense witness Carl E. Lovell, whether or not he knew about a check made payable to Mr. Abraham which the government alleged represented a "bribe" to shopkeepers for the granting of leased space at the Aladdin. Vigorous objections and legal arguments were advanced by Mr. Abraham's counsel that day at sidebar (Tr. 3239-3243) and later in chambers (Tr. 3272-3276,

and 3288-3330). In addition, on February 21, 1979, the trial court heard additional legal argument (Tr. 3338-3356) and allowed the government to *voir dire* Mr. Lovell, outside the hearing of the jury (Tr. 3356). The court—although from the outset acknowledging the significant prejudice such question would produce considering the slim evidence against Mr. Abraham (Tr. 3234-3243)—concluded that the government's insistence that it was acting in good faith was sufficient to permit the question under Rule 405(a), Federal Rules of Evidence (Tr. 3338-3343). Further, the court quieted its expressed fears of prejudicial effect by commenting that at least "the cross-examination of the character witness is as to the character witness' credibility, not as to the conduct of the defendant." (Tr. 3343).

The *voir dire* disclosed that Mr. Lovell would testify that he did not know nor had he heard that payments personally were made to Mr. Abraham in exchange for the granting of leases to shopkeepers at the Aladdin. (Tr. 3357-3358). Mr. Abraham's counsel then, in support of this continuing objection (Tr. 3359-3379), announced to the court at this time that during the previous twelve hours he was able to ascertain the true state of affairs regarding this check (Tr. 3368), matters to which Mr. Lovell would be incapable of testifying. Nevertheless, without any further basis than the mere existence of a $1,000 check made payable to Mr. Abraham, the court allowed the government to ask this inflammatory and provocative question in the presence of the jury. The inflammatory nature of the question is best demonstrated by the government's own words: "I submit [this] shows dishonesty, misrepresentation, fraud on the corporation." (Tr. 3273). The exact words of the question are as follows (Tr. 3386):

> Q. Then I will ask you did you know or have you heard that in order for a shop, or store to do business with the Aladdin Hotel Corporation, that is, to lease space from the Aladdin Hotel Corporation for a shop or a store inside the casino and hotel area, that payments were made personally to Mr. Abraham, not to the corporation, in exchange for getting that space?

The court allowed this question to be asked before the jury pursuant to the authority of Rule 405(a), Federal Rules of Evidence, even though *voir dire* had disclosed that Mr. Lovell would answer that he had not heard or did not know of such activity, and in spite of the fact that defense counsel had contended that such misconduct had not occurred. Mr. Abraham's counsel immediately moved for a mistrial (Tr. 3388). The motion was denied *(id)*.

The following day—the third day which had been consumed by this matter—the government made a proffer to the court outside the hearing of the jury of further testimony by a witness named Ray Warren upon the subject of Mr. Abraham's alleged misconduct in extending leases for space (Tr. 3436-3452). Mr. Warren's testimony failed to support the government's contention that the $1,000 payment represented any misconduct on Mr. Abraham's part.

Further, by this time defense counsel was able to present two witnesses, Messrs. Johnson (Tr. 3467-3477), and Saputo (Tr. 3477-3489), whose testimony was also heard by the court outside the hearing of the jury. Both Messrs. Johnson and Saputo had personal knowledge

of the events leading up to and concerning the payment, purpose, and disbursement of the $1,000 check. They testified that (1) the check was not generated for Mr. Abraham's gain; (2) in fact the check was for payment to Aladdin Hotel personnel in settlement of claims which they believed they had arising from the new ticketing operation which was just establishing business in the hotel; and (3) it was within Mr. Abraham's scope of responsibility to negotiate the lease of the ticketing agency and the settlement of the claim.

After hearing this testimony outside of the presence of the jury, the court indicated that the charge of "bribe" was without any basis in fact. For this reason, the government, agreeing with the court, moved to strike its question (Tr. 3492). Mr. Abraham's counsel refused to join in this motion to strike, but moved a second time for a mistrial. (Tr. 3388 and 3492-3493). After these motions were denied (Tr. 3388 and 3493), he requested the following curative instruction (Tr. 3495):

> I instruct you that the the final series of questions Mr. Hunterton asked of Mr. Lovell concerning the payment allegedly made to Mr. Abraham by persons seeking space at the Aladdin Hotel has been withdrawn at the request of the government. I have conducted a hearing and I heard witnesses and found . . . that there was no basis for those questions.

The court refused *(id)*, but merely told the jury (Tr. 3500) that the question was withdrawn by the government and should be disregarded. The jury was

never told why the question had been withdrawn: that, in fact, there was no factual foundation for it whatsoever.

In affirming Mr. Abraham's conviction, the United States Court of Appeals for the Sixth Circuit stated as follows:

> Error was assigned as to the cross-examination of the character witness Lovell, a former City Attorney in Las Vegas, who volunteered that Abraham enjoyed a good reputation with Nevada's "law enforcement community." He was asked upon cross-examination whether he had heard that in order for a shop or store to do business with Aladdin Hotel Corporation to obtain store space in the area that payments were made personally to Abraham, not to the corporation. Lovell answered, "No I don't know that." Before asking the question, at a sidebar conference with the court not in the presence of the jury, the government produced evidence showing justification namely, the cancelled check and the court permitted the question to be answered and gave proper instruction to the jury as to its purpose. Further proceedings developed thereafter including rebuttal and surrebuttal evidence and when it appeared to everyone that this was creating a trial within a trial, the government moved to withdraw the question, in which counsel for Abraham joined. The trial court granted the motion finding that ". . . the spirit of *Michelson v. United States*, 335 U.S. 469 (1948) had been observed and the prejudice if any was dissipated in Abraham's favor." We find no abuse of discretion

on the part of the District Judge in his handling of these issues.

(App. B).

As the above facts demonstrate, the Sixth Circuit was under a misapprehension of the facts. Upon Petition for Rehearing, Mr. Abraham brought to the attention of the United States Court of Appeals for the Sixth Circuit panel the following misconceived conclusions: (1) that the further evidence of rebuttal and surrebuttal were on *voir dire* outside the presence of the jury (a request that the jury be allowed to hear this evidence was denied, Tr. 3490); (2) that Mr. Abraham did not join the motion to strike; and (3) that he repeatedly requested further relief, including the granting of a mistrial (Tr. 3388 and 3492-3493) and a curative instruction after the withdrawal of the question (Tr. 3495). (App. C). Nevertheless, the Court refused to rehear the matter. (App. D).

Thus, all the jury ever heard regarding this matter was the startling and defamatory question itself, and some two days later, a one sentence statement by the trial judge that the question had been withdrawn by the government. The jury was left by the court's silence to ponder upon the full extent of Mr. Abraham's request for bribe money. Thus, the effect of the asking of the question, the giving of a negative response, and later, the withdrawal of that line of inquiry by the government, was to (1) improperly permit the asking of the question and the negative response to discredit Mr. Lovell's knowledge of Mr. Abraham's reputation in the community, and (2) to leave in the jury's mind the erroneous belief

that Mr. Abraham engaged in improper self-dealing for his own profit.

REASON FOR GRANTING THE WRIT

THIS COURT OUGHT TO GRANT CERTIORARI IN ORDER TO DETERMINE WHETHER DUE PROCESS DEMANDS THE JUDICIAL ADOPTION OF LIMITATIONS UPON THE DISCRETION OF THE TRIAL JUDGE IN PERMITTING CROSS-EXAMINATION PURSUANT TO RULE 405(a), FEDERAL RULES OF EVIDENCE, AS THE FIFTH AND DISTRICT OF COLUMBIA CIRCUITS HAVE ALREADY DONE.

We request this Court grant certiorari in this case in order to determine whether procedural safeguards should be announced to guide a judge's discretion in permitting the cross-examination of a character witness under Rule 405(a), Federal Rules of Evidence.

As the Advisory Committee Notes to Rule 405(a) disclose, this Rule sought to codify this Court's holding in *Michelson v. United States*, 335 U.S. 469, 479 (1948):

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. . . . [H]is own [character] witness is subject to cross-

> examination as to the content and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans.

Although Rule 405(a) codified this cross-examination right, it did not further codify in express terms the protective measures mentioned with approval in *Michelson;* specifically, that there the trial court

> took pains to ascertain, out of the presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation. He satisfied himself that counsel was not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box.

Id., at 480-481.

Many Circuits have seemingly overlooked these admonitions and have rested upon the bare words of the rule as permitting unfettered and unregulated cross-examination. Thus, these Circuits, among which is the Sixth Circuit, seemingly believe that by promulgation of Rule 405(a), Federal Rules of Evidence, the legislature had by implication partially overruled the holding in *Michelson.*

The Fifth Circuit however, has continued to acknowledge those protective measures by holding that there are:

> two important limitations upon judicial discretion in admitting inquiries concerning such prior misconduct: First, a requirement that the prosecution have some good faith factual basis for the incidents inquired about and second, a requirement that the incidents inquired about are relevant to the character traits involved at trial.

United States v. Wells, 525 F.2d 974, 976-977 (5th Cir. 1976). *Accord, United States v. Renfro,* 620 F.2d 497, 501 (5th Cir. 1980); *United States v. Bright,* 588 F.2d 504, 512 (5th Cir. 1979); *United States v. Bynum,* 566 F.2d 914, 919 (5th Cir. 1978); *United States v. Edwards,* 549 F.2d 362, 367 (5th Cir. 1977).

The District of Columbia Circuit also has judicially imposed limitations upon questions regarding specific instances of conduct on cross-examination pursuant to Rule 405(a), by holding that:

> The discretion which trial judges are thus summoned to exercise is an informed discretion — one which takes into account all relevant factors deserving of consideration. The discretionary function is aborted if the judge acts without the information essential to comprehension and treatment of those factors.
>
> * * *
>
> Moreover, as we have said, the ruling necessitated a careful balance of probative value in prejudice and there was no indication of such process here.

United States v. Lewis, 482 F.2d 632, 644-645 (D.C. Cir. 1973). Thus, in the District of Columbia Circuit, the trial court's discretion in permitting cross-examination under Rule 405(a) must be guided by the application of Rule 403, Federal Rules of Evidence. *United States v. Haldeman*, 559 F.2d 31, 91 (D.C. Cir. 1976).

These two Circuits are the only Circuits in the federal system that recognize the application of these limitations — first set forth in *Michelson v. United States*, *id.*, — to the use of cross-examination of character witnesses about specific instances of conduct. *See United States v. Morgan*, 554 F.2d 31 (2d Cir. 1977); *United States v. Apfelbaum*, 621 F.2d 62 (3d Cir. 1980); *United States v. Evans*, 569 F.2d 209 (4th Cir. 1978); *United States v. Payne*, 635 F.2d 643 (7th Cir. 1980); *United States v. Burgard*, 551 F.2d 190 (8th Cir. 1977); *United States v. Nace*, 561 F.2d 763 (9th Cir. 1977); *United States v. Evans*, 542 F.2d 805 (10th Cir. 1976).

Likewise, the Sixth Circuit has failed to set forth protective limitations upon a trial court's discretion in permitting such cross-examination. *See United States v. Kirk*, 584 F.2d 773 (6th Cir. 1978); *United States v. Reese*, 568 F.2d 1246 (6th Cir. 1977); *United States v. Wells*, 437 F.2d 1144 (6th Cir. 1971). The only protection the Sixth Circuit has extended is its suggestion in *United States v. Reese*, 568 F.2d 1246 (6th Cir. 1977), that *voir dire* of the witness to determine the validity of the rumors — prior to the question being asked in the presence of the jury — would be the "better practice," but the exercise of the judge's discretion is paramount.

If the "better practice" had been followed here, the overwhelming prejudice resulting from inadmissible testimony would not have infected this trial. Once Mr. Abraham was given adequate opportunity to refute by witnesses the government's theory of the $1,000 check, it became glaringly clear that there was no basis in fact for believing that he had engaged in any impropriety or misconduct. The check represented no evidence of any instance which would have tainted Mr. Abraham's reputation in the community, and accordingly was also not evidence that could affect the credibility of his character witness, Mr. Lovell. From the start it never appeared that the $1,000 check, even if the government's theory had proved correct, concerned any rumor about which his friends and acquaintances might know or have heard. Thus, had the limitations which the Fifth Circuit and the District of Columbia Circuits impose upon Rule 405(a) cross-examination been applied by the trial court in this case, the question would never have been permitted to be asked. Once asked, applying those selfsame limitations would have mandated the granting

of the defendant's mistrial motion, or at least the curative instruction he requested the court to give the jury once the question was withdrawn.

We request this Court grant certiorari in order to give us the opportunity to urge that such limitations as imposed by the Fifth Circuit and the District of Columbia Circuit be adopted as due process limitations upon the trial court's discretion in permitting cross-examination of character witnesses pursuant to Rule 405(a), Federal Rules of Evidence and the Fifth Amendment to the Constitution of the United States. We also request that certiorari be granted in order that this Court may do justice by exercising its supervisory powers to overturn this conviction and grant a new trial.

CONCLUSION

For all the above and foregoing reasons, James Abraham requests this Court grant Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one copy of the foregoing Petition For Writ of Certiorari was mailed to the following on this 22 day of May, 1981.

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APPENDIX A

[FILED JULY 10, 1979]

United States District Court

THE EASTERN DISTRICT OF MICHIGAN

United States of America

vs.

JAMES ABRAHAM

Defendant

DOCKET NO. 8-80572-03

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 9, 1979.

WITH COUNSEL Albert Krieger/David F. DuMouchel.

There being a finding/verdict of GUILTY. of counts three and four of the indictment.

Defendant has been convicted as charged of the offense(s) of conspiracy to violate and violation of the Travel Act, United States Code, Title 18, Sections 371 and 1952.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years concurrent on each count; it is further ordered that all but the first ninety (90) days of this sentence be suspended, and that the defendant be placed on two (2) years probation following his period of custody. As a special condition of his probation, defendant is ordered to pay a fine of two thousand five hundred dollars ($2,500.00) on each count.

Defendant is continued on his bond until notified to report to the designated facility by Frank Uzzo, Bureau of Prisons Representative in Detroit, Michigan.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and any time during the probation period or within a maximum probation period of five years permitted by law may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends, the program at the West Glen Center on Webster Street in North Las Vegas, Nevada.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY U.S. District Judge John Feikens, Date July 10, 1979.

APPENDIX B

Nos. 79-5255, 79-5317, 79-5318, 79-5319, 79-5320

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES GOLDFARB, JAMES TAMER, JAMES ABRAHAM, EDWARD MONAZYM, AND THE ALADDIN HOTEL CORPORATION,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 5, 1981.

Before: WEICK, LIVELY and BROWN, Circuit Judges.

WEICK, Circuit Judge. Appellants Charles Goldfarb and James Abraham appeal from judgments of conviction entered upon jury verdicts of guilty of the substantive offense prescribed by the Travel Act, 18 U.S.C. §1952.[1] All of the

---

[1] 18 U.S.C. § 1952 provides in pertinent part that:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

• • •

(3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) shall be

appellants appeal from judgments of conviction for conspiracy to violate the Travel Act, 18 U.S.C. § 371.[2] The appeals were consolidated for oral argument.

The appellants raise a number of issues on appeal[3] in their

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fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States, . . .

[2] 18 U.S.C. § 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[3] These include the following:

(a) Appellant Tamer raises issues dealing with the denial of his right to a unanimous verdict, the trial court's failure to exclude certain evidence, the court's instructions to the jury and denial of his motion to suppress.

(b) Aladdin contends that the conspiracy against it was a legal and factual impossibility; that the indictment should have been dismissed for vagueness or in the alternative that the court erred in failing to grant the motion for a bill of particulars; and that the court erred in failing to grant its motion for severance.

(c) Abraham contends that the evidence against him was insufficient to support his conviction; that certain evidence of an uncharged conspiracy should not have been admitted; that certain *in camera* proceedings conducted to the exclusion of Abraham constitute reversible error; and that he was entitled to a mistrial as a result of the prosecution's allegedly irrelevant and prejudicial questioning of a character witness.

(d) Monazym challenges the sufficiency of the evidence against him; alleges the existence of multiple conspiracies and prejudicial variance; and claims violations of his 6th Amendment right to counsel as a result of the *in camera* proceedings which were conducted to his exclusion.

(e) Other aspects of the "common argument" involve variance and amendment of the indictment, and misstatements and misconstructions of Nevada statutes and regulations.

(f) Each appellant expressly adopts the arguments of his co-

separate briefs. Each appellant assigns errors which pertain specifically to the government's case against him, and the appellants together present a number of common arguments. One such common argument has several facets and is variously formulated by each appellant. It relates to the treatment by the court of Gaming Regulations promulgated by the Nevada Gaming Commission pursuant to statutory authority, violations of which appellants claim do not constitute unlawful activity as prohibited by the Travel Act.

District Judge Feikens carefully considered all of these issues in his "Opinion Denying Post Trial Motions" for judgments of acquittal, new trial, and arrest of judgment. App. 438-458. We agree with his decision and affirm the judgments of conviction for the reasons set forth therein on which we will elaborate hereinafter.

Judge Feikens denied a pretrial motion of the defendants to dismiss the indictment in an opinion reported in *United States* v. *Goldfarb*, 464 F. Supp. 565 (E. D. Mich. 1979) in which he ruled upon the constitutionality of the Nevada Gaming Control Act and held it was not unconstitutional as being violative of the due process rights of defendant Goldfarb who was denied a gaming license.

In these appeals, the parties have filed four volumes of appendices, 4,000 pages of transcripts, and tapes recording conversations played for the jury but not included in the transcripts.

Mostly issues of law are raised in the briefs. The brief of Goldfarb's counsel commendably states: "The sufficiency of the evidence to sustain the jury verdict is not in question here."

Goldfarb had a remedy in the state court of Nevada which he invoked to compel the issuance of a license to him but he

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appellants to the extent they apply pursuant to the Federal Rules of Appellate Procedure. Rule 28(i).

All of these issues were carefully considered by District Judge Feikens in his "Opinion Denying Post Trial Motions" for judgments of acquittal, new trial, and arrest of judgment. App. 438-458.

dismissed the suit. The trouble here is that Goldfarb and the other defendants, by concealment and violation of Nevada statutes and their implementing regulations authorized by the statutes, were actually engaged in the illegal unlicensed management, maintenance, control and operation of the hotel and casino.

I

Defendant-appellant Charles Goldfarb was a bondsman who resided in Birmingham, Michigan. In 1971, he and a small group of investors purchased the Aladdin Hotel and casino, located in Las Vegas, Nevada, which at that time was owned by the Recrion Corporation. Goldfarb then applied to the State Gaming Control Board/Nevada Gaming Commission for licensure as a stockholder-officer of the new corporation, Aladdin Hotel Corporation. His request was denied when the Nevada Gaming Commission determined that he had an "unsuitable background and unsuitable associations." Goldfarb then divested himself of his eight percent (8%) interest in the hotel-casino. He later acquired an option to purchase stock from a licensed stockholder of the new corporation and reapplied for a stockholder's license. That application is still pending and has not been ruled upon by the Commission. Apparently, it has not been pressed.

The bulk of the evidence presented against the appellants consisted of over 100 telephone conversations intercepted by the government agents pursuant to court authorization. In all, approximately 15,000 calls were intercepted. The conversations introduced at trial were between Goldfarb and his co-defendants: James Tamer, the Entertainment Director of the Aladdin; James Abraham, the Executive Vice-President and General Manager of the Aladdin; and Edward Monazym, a Casino employee; as well as some calls between third parties and the various co-defendants.

The evidence adduced at trial showed that Goldfarb, having

failed in his attempt to become a licensee owner of the hotel casino, did with the aid of the other defendants, maintain a secret and illegal role in the ownership, operation, conducting and carrying on of the gaming operations of the hotel casino. He recommended complimentary services, including free accommodations, for certain customers and had a hand in arranging for the extension of credit for individuals whom he sent to the hotel. His advice and assistance was sought and given concerning certain financial problems of the hotel as well, including arrangements for emergency financing with false net worth statements to an unnamed bank or banks and also possible sale or lease of the hotel. He finally arranged for a loan from the Teamsters Pension Fund. The government contended that this was in keeping with the defendants' scheme to engage in the clandestine ownership, conducting and carrying on of the gaming operations of the Aladdin by persons not licensed to do so and whose interest in the casino had been concealed from the state in violation of certain Nevada statutes and regulations.

The defendants contended that the evidence was perfectly consistent with the fact that Goldfarb was a valued customer of the casino; a former investor, and possibly a future stockholder-officer of the corporation; a close associate of the management personnel of the hotel; and an individual who had used his contacts to direct many so-called "highrollers" to the hotel, many of whom then became regular customers who lost large sums in gambling.

This was a disputed issue of fact requiring resolution by the jury.

The Travel Act, as applied to the instant case, required that a facility of interstate commerce (here a telephone) be used to promote, establish, carry on, etc., an unlawful activity. "Unlawful activity" is defined as any business enterprise involving gambling offenses in violation of the laws of the state in which they are committed.[4]

[4] See footnote 1, *supra*.

There is some dispute as to the nature and essentiality of the underlying state law violation, although most decisions agree that it is the violation of federal law which is the gravamen of a Travel Act offense. *United States* v. *Prince*, 529 F. 2d 1108 (6th Cir. 1976), *cert. den.*, 429 U.S. 838; *United States* v. *Polizzi*, 500 F. 2d 856 (9th Cir. 1974), *cert. den.*, 419 U.S. 1120 (1975). Some courts hold that proof of the commission or attempted commission of a state defined criminal offense is an essential element of a Travel Act conviction, *United States* v. *Hiatt*, 527 F. 2d 1048 (9th Cir. 1975); *United States* v. *Polizzi, supra; United States* v. *Kahn*, 472 F. 2d 272 (2d Cir. 1973), *cert. den.*, 411 U.S. 982, while others hold that it is not. *United States* v. *Prince*, 515 F. 2d 564 (5th Cir. 1975), *cert. den.*, 423 U.S. 1032; *United States* v. *Goldfarb*, 464 F. Supp. 565 (E. D. Mich. 1979). It is certainly true that the state crime need not be actually accomplished. *United States* v. *Pomponio*, 511 F. 2d 953 (4th Cir. 1975), *cert. den.*, 423 U.S. 874.

It is abundantly clear that as a predicate to a Travel Act conviction, absent a distinct violation of a law of the United States, the defendants must have engegad in some form of unlawful activity prohibited by the law of the State of Nevada. This contention is beyond dispute and amply supported by the language of the Act and by the case law.

II

The defendants-appellants were indicted on a four-count Revised Indictment.[5] In Count One of the indictment, Goldfarb was charged with a substantive violation of the Travel Act. The alleged "unlawful activity" was the

> ownership, operation, conducting and carrying on of gaming operations of a Las Vegas, Nevada gaming casino, the ALADDIN HOTEL AND CASINO, by a person who

[5] The original indictment consisting of 22 counts was found to be multiplicitous by the trial court.

was not licensed by and whose interest in the gaming casino had been concealed from agencies of the State of Nevada in violation of Nevada Revised Statutes, Sections 463.160.1(a)[6] and 463.335,[7] and Nevada Gaming Commission Regulations 3.100 paragraph 1, (b), (d), (f), (g) and (i), 3.100 paragraph 3,[8] 3.110[9] and 8.060.[10]

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[6] NRS § 463.160(1)(a) provides:

License required.

1. It is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:

(a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any game or slot machine as defined in this chapter, or to operate, carry on, conduct or maintain any horserace book or sports pool;

* * *

without having first procured, and thereafter maintaining in full force and effect, all federal, state, county and municipal gaming licenses as required by statute or ordinance or by the governing board of any unincorporated city or town.

[7] NRS § 463.335 provides in pertinent part:

Gaming employees required to hold work permits; hearings and review; confidential records; expiration of work permits.

1. As used in this section:

(a) "Gaming employee" means any person connected directly with the operation of a nonrestricted establishment, and includes without limitation:

(1) Boxmen;
(2) Cashiers;
(3) Dealers;
(4) Floormen;
(5) Hosts or other persons empowered to extend credit or complimentary services;
(6) Keno runners;
(7) Keno writers;
(8) Machine mechanics;
(9) Security personnel;
(10) Shift or pit bosses;
(11) Shills; and
(12) Supervisors or managers.

"Gaming employee" does not include bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages. . . .

[8] Nevada Gaming Commission Regulation 3.100 provides in pertinent part:

Employee report.

1. Annually, on or before the 15th of July, each nonrestricted licensee, as defined in Reg. 4.030.1(b), shall submit an employee report to the board on a form to be furnished by the board.

The indictment alleges specific acts committed by Goldfarb in the course of the performance of the unlawful activity.

Appellant Tamer was acquitted by the jury of the substantive Travel Act count but was convicted of conspiracy.

The report shall identify every individual who is directly or indirectly engaged in the administration or supervision of the gaming operations or physical security activities of such nonrestricted licensee. The following classes of gaming employees are presumed to be actively and directly engaged in the administration or supervision of gaming:

. . .

(b) All individuals who may approve or extend gaming credit in any amount, or whose recommendations in this regard are ordinarily sought or followed;

. . .

(d) All individuals who have the authority to supervise or direct a shift of any gaming or security activity, including but not limited to supervision or direction of the pit area, keno or bingo games, slot machines, race or sports books, pari-mutuel operations, or any persons having authority to supervise or direct such persons;

. . .

(f) All individuals who may approve or extend to casino patrons complimentary house services other than beverages only;

(g) All individuals who supervise or direct other employees engaged in the control of gaming assets and revenues and record keeping, including the recording of cash and evidences of indebtedness, and the maintenance, review or control of the records, accounts, and reports of transactions which are required to be kept pursuant to Reg. 6;

. . .

(i) All individuals who individually or as a part of a group formulate management policy.

. . .

3. Any changes, additions, or deletions to any information contained within the annual employee report which occurs subsequent to the filing of the report and prior to the filing of the report for the next calendar year shall be reported to the board in writing no less than 10 days after the end of the calendar quarter during which the change, addition, or deletion occurred.

• Nevada Gaming Commission Regulation 3.110 provides in pertinent part:

Key employee.

1. Any executive, employee, or agent of a gaming licensee having the power to exercise a significant influence over decisions concerning any part of the operation of a gaming licensee or who is listed or should be listed in the annual report required by Reg. 3.100 is a key employee.

Count Three charged appellant Abraham with a substantive violation of the Travel Act in much the same language as the charge against Goldfarb. The alleged unlawful activity was based upon the same Nevada Statutes and Regulations.[11] Abraham was alleged to have discussed with Goldfarb the extension of complimentary privileges to patrons of the Aladdin which constituted, directly or indirectly, the administration, supervision and influence of Goldfarb over the gaming operations of the Aladdin with the consent and assistance of Abraham and in violation of the aforementioned statutes and regulations. Abraham was convicted on this count.

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2. Whenever it is the judgment of at least 3 members of the commission that the public interest and the policies set forth in Nevada Revised Statutes Chapter 463, the Nevada Gaming Control Act, will be served by requiring any key employee to be licensed, the commission shall serve notice of such determination upon the licensee. The commission shall not be restricted by the title of the job performed but shall consider the functions and responsibilities of the person involved in making its decision as to key employee status. Grounds for requiring licensing of a key employee which are deemed to serve the public interest and the policies of the Nevada Gaming Control Act include but are not limited to the following:

(a) The key employee is new to the industry, the particular gaming establishment, the position, or the level of influence or responsibility which he has and the board or commission has little or outdated information concerning his character, background, reputation, or associations, or

(b) Information has been received by the board or commission which, if true, would constitute grounds for a finding of unsuitability to be associated with a gaming enterprise.

[10] Nevada Gaming Commission Regulation 8.060 provides:

Participation in operations. Except as and to the extent provided in these regulations pertaining to emergency situations, or on written approval of the commission, no person who proposes to acquire an interest in any licensed gaming operation, in a licensee or in a holding company shall in connection therewith take any part or be permitted to take any part whatever, as an employee or otherwise, in the conduct of such gaming operations or in the operation of the establishment wherein such gaming operations are conducted during the pendency of his application for license or to be permitted to acquire such interest.

[11] The statutes and regulations relied upon are identical except that Count Three omits Nevada Gaming Regulation 3.100(1)(b) and (g).

Count Four is the conspiracy count of the indictment on which all of the defendants were convicted. It charged that the defendants willfully and knowingly conspired to use facilities of interstate commerce to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely; the ownership, operation, conducting and carrying on of gaming operations of a Las Vegas, Nevada gaming Casino by persons who were not licensed to do so and whose interest in the gaming casino had been concealed from the State of Nevada and did thereafter commit acts in order to promote this unlawful activity, all in violation of 18 U.S.C. § 1952, 18 U.S.C. § 371.

As before stated, the appellants filed two joint motions to dismiss the original indictment. Those motions apply equally to the revised four-count indictment. In the motion the appellants argued, *inter alia*, that Nevada Gaming Commission Regulations are not "law" for the purposes of criminal prosecutions. From the earliest stages of the proceedings, the defendants objected to and expressed concern over the notion that a violation of a Nevada Gaming Commission regulation could form the predicate state law violation required for a federal prosecution under the Travel Act. It could not in and of itself.

In response to the motion to dismiss, the government stated that:

> . . . the predicate "unlawful activity" in this prosecution arises from the violations of the cited Nevada *statutes* in each count. The additional citation to the regulations is solely to provide additional particularity in indicating the application of the statute to the specific activity described in each count. We do not quarrel with the defense position that violations of the regulations in and of themselves are not criminal acts within the purview of the Travel Act. . . .
>
> We do not quarrel that the defendants would be en-

> titled to a charge that in order to find a defendant guilty of a particular count that it must find a defendant violated the provisions of the Nevada statute cited and described therein.
>
> (Government's Response to Motion to Dismiss, Appendix p. 138-39.)

Still claiming inability to comprehend and therefore defend against the charges, the defendant's filed a joint motion for a bill of particulars. The court requested the parties to agree among themselves as to the particulars which they apparently did.

The court instructed the jury as follows:

> Now as to the meaning of the phrase unlawful activity in the Travel Act, the State of Nevada has a comprehensive scheme of regulatory statutes. Under those statutes a gaming commission and a gaming board are established and they are commanded to and have enacted regulations which have the force of law. It is that law which defines unlawful activity.

In *Berman* v. *Riverside Casino Corp.*, 247 F. Supp. 243, 248 (D. Nev. 1964), *aff'd* 354 F. 2d 43 (9th Cir. 1965), the court held that regulations promulgated by the Nevada Gaming Commission "have the force and effect of law." Cf. *United States* v. *Polizzi*, 500 F. 2d 856, 875 (9th Cir. 1974), *cert. den.*, 419 U.S. 1120 (1975).

N. R. S. 463.1594 specifically provides that the regulations are intended to implement the provisions of the statutes requiring disclosure of a corporate licensee's key personnel. Also, N. R. S. 463.150(2)(a) provides that the regulations shall prescribe "the method and form of application which any applicant for a gaming license . . . shall follow and complete . . . ." The court was thus required to include an instruction on regulations so that the jury would not completely disregard them. The court did not instruct the jury at any

place that a violation of a regulation, in and of itself, constituted an "unlawful activity." To give such an instruction would have been prejudicial error. *United States* v. *Eaton*, 144 U.S. 677 (1892); *Singer* v. *United States*, 323 U.S. 338 (1944).

In *United States* v. *Grimaud*, 220 U.S. 506, 517 (1910) the court stated:

> From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations – not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

Reliance by appellants on *United States* v. *Gordon*, 464 F. 2d 357 (9th Cir. 1972) is misplaced. That case held that bookmakers and their employees do not engage in illegal gambling business within the prohibition of federal law by violating nonpenal regulations of state gaming commission. *Gordon* appears to be somewhat in conflict with the subsequent decision of the Ninth Circuit in *Polizzi* and is not even cited or discussed in *Polizzi*.

In *United States* v. *Seelig*, 622 F. 2d 207, 210 (6th Cir. 1980), we considered violations of the Controlled Substances Act, 21 U.S.C. § 841(a)(1) and regulations promulgated thereunder which were authorized by Congress. There, as here, the defendants contended that violations of the regulations did not constitute an offense. We stated:

> The combination of § 829(c) and § 822(b) thus requires a person to dispense or distribute a schedule V drug for a

> medical purpose and to be within the authority of their registration as determined by the Attorney General. Section 822(a) requires every person who distributes or dispenses controlled substances to register with the Attorney General. Section 821 authorizes the Attorney General to promulgate rules and regulations relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances. Section 871(b) authorizes the Attorney General to promulgate and enforce rules, regulations and procedures that he deems necessary for the efficient execution of his functions.
>
> Although Congress was not as clear in this statute as in the one involved in *Grimaud*, this Court is satisfied that the statute does expressly, albeit in a convoluted fashion, provide that a violation of the promulgated rules constitutes an unlawful act under the Controlled Substances Act. Thus, counts 1-165 do charge crimes.

During the presentation of evidence to the jury in response to the defendants' and the trial court's desire to have the legal theory of the case made clear, the government filed a document entitled "Government's Theory of the Case." Here again, the government disclaimed reliance upon the Nevada Gaming Regulations alone, stating that: "to be sure, a violation of the Regulations which is not concomitant with a statutory violation will not support a Travel Act violation." (Appendix, p. 283)

Thus the violation of the Nevada statutes and implementing regulations would constitute unlawful activity under the Travel Act. The disclosure provisions required by Regulation 3.100 are cumulative to those contained in the Nevada statutes. N. R. S. 463.165, 463.339, 463.520, 463.530, 463.560.

In any event, under the conspiracy count, the violation of the regulations alone would certainly be considered as overt acts by the defendants committing them which are ingredients of the crime of conspiracy.

III

With this principle in mind, we now turn to the trial court's instruction to the jury on the meaning of "unlawful activity" and the significance of the Nevada Gaming Regulations.

The court first instructed the jury on Count IV of the indictment, the conspiracy charge. After preliminary matters of defining conspiracy and its elements to the jury, the court began to instruct on the application of the Travel Act. After reading the Act, in pertinent part, the court instructed on the meaning of the phrase "unlawful activity." As a general background, the court instructed as follows:

> . . . the state of Nevada has a comprehensive scheme of regulatory statutes. Under these statutes a gaming commission and a gaming board are established and they are commanded to and have enacted regulations which have the force of law. It is that law which defines unlawful activity.
>
> In order to regulate gambling under Nevada law these statutes require full disclosures. Only through full and accurate disclosure of all persons who are connected with gambling in Nevada can the Nevada gaming authorities properly perform their functions in excluding from the industry all who are in the authorities' opinions, unsuitable or undesirable for any number of reasons. (Appendix 1205-06)

The court further instructed the jury on unlawful activity based upon a violation of Nevada statutory law as follows:

> Nevada Revised Statute 463.530 requires that all persons who require [sic] to become owners or shareholders in a gaming operation must have come before the Nevada gaming authorities for determination as to the suitability for license. The Nevada gaming authorities then make a decision whether to then issue a license to an applicant. If they deny the applicant a license, that person may not

then thereafter exercise any ownership of, operation, conduct of the gaming affairs of the casino.

Another Nevada statute, NSR 463.130, states that the violation of these Nevada gaming statutes is a crime, a gross misdemeanor. Thus, by concealment of his ownership or operation or conduct in the gaming conspiracy, a person may violate the Nevada laws.

Keep in mind it is not the concealment itself which is the violation of the statute I have just discussed but rather the violation is the unlicensed ownership or operation of the gaming casino which is accomplished by concealment. (Appendix, p. 1206-07)

The court then continued:

I now take up another aspect of the Nevada laws on gambling. One of the regulations, [3].100, which is mandated by Nevada statute is required, [sic] all holders of non-restricted licenses to disclose to the Nevada gaming authorities names of all persons exercising significant control and influence over gaming. Any changes in such activities must also be reported to the Nevada gaming authorities because of a strong state policy requiring disclosure of all persons who have significant control and influence as to gaming, and because of the statutory command that all gaming licenses which, whether held by a corporation such as the Aladdin Hotel or by individuals, must be maintained in conformity with all relevant provisions.

I instruct you that it is illegal under Nevada gaming laws for anyone exercising a significant control and influence as to gaming to conceal that control and influence from the Nevada gaming authorities. The essence or gist of the violation I have just outlined is concealment, for which failure to disclose, this must be contrasted with the first instance of violation I described earlier, that violation having to do with an unlawful or unlawful licensing viola-

> tion of the Nevada casino, where the concealment is a means to achieve the violation but not itself the actual unlawful activity. (Appendix, p. 1207-08)

This in our opinion correctly stated the Nevada law.

In the instruction on the substantive offense charge against Goldfarb, the court stated that:

> [h]eretofore I have discussed with you in considering the charge of conspiracy as to entail the meaning of the phrase unlawful activity. Without repeating those instructions that I gave you then with the request that you keep them in mind here, I specifically charge you that the unlawful activity which it is alleged the defendant Goldfarb engaged in is as follows: . . .

The court then described a statutory theory based on Nevada Revised Statutes § 463.335 as was done in the conspiracy charge. In concluding the instruction, the court again offered the jury the elements of unlawful activity:

> Additionally, in order for you to find the Defendant Goldfarb guilty of the charges contained in Count I of the indictment, the Government must also prove beyond a reasonable doubt either that:
>
> (1) Defendant Goldfarb willfully engaged in the ownesrhip, operation or conducting or carrying on of gaming operations of the Aladdin Hotel and Casino without a license from the Nevada Gaming Authorities to do so, or;
>
> (2) Defendant Goldfarb willfully concealed his ownership, operation or conducting or carrying on of gaming operations of the Aladdin Hotel and Casino from the Nevada Gaming Authorities for which he was not licensed.
>
> Or both of these elements. (Appendix pp. 1217-18)

This instruction was not duplicitous as claimed for either or both elements constitute an offense under Nevada law. The

jury was also instructed that its verdict had to be unanimous.

In its opinion denying post trial motions, the court relied on the Nevada statutes which it stated were broad enough to encompass Goldfarb's conduct. (App. 440)

IV

The indictment charged Tamer with violating NRS 463.-160.1(a) and Nevada Gaming Commission Regulations 3.100 (1)(i), 3.100(3) and 3.110. He was charged with performing as a "key employee" without being licensed to do so. Tamer was acquitted of the substantive Travel Act violation.

After reading the indictment and summarizing the Travel Act, the court instructed on the meaning of "unlawful activity" as follows:

> Under Nevada gaming laws a casino (or non-restricted licensee as it is called) must report to the Nevada Gaming Authorities the identity of anyone who is directly or indirectly involved in the casino's administration; that is, anyone who has a significant influence and control at the casino. The regulation that requires this disclosure has the force of law and its requirement of disclosure is in harmony with a number of other Nevada gaming statutes. Thus, under Nevada gaming law, it is required that the casino disclose the identity of anyone exerting significant influence and control at the casino. The disclosure is necessary so that the Nevada Gaming Authorities can regulate gambling by determining that such a person should be licensed, if he is to continue the exercise of significant control and influence at the casino. Now, the Aladdin itself is not charged with the violation. However, defendant Tamer is; it is charged in this indictment that defendant Tamer did, in concert with the Aladdin, cause his true role at the casino to be concealed from the Nevada Gaming Authorities, in violation of Nevada gaming laws.

V

As to Abraham, the district court in instructing on Count III of the indictment again carried through its interpretation of "unlawful activity." The court charged the jury as follows:

> The unlawful activity here charged is a certain kind of unlawful activity as is charged in Count I against Defendant Goldfarb, although the telephone call alleged in the indictment between defendant Goldfarb and defendant Abraham occurred on March 15, 1977. (Appendix pp. 1226-27)
>
> • • •
>
> Additionally, in order for you to find defendant Abraham guilty of the charges contained in Count III of the indictment, the Government must also prove beyond a reasonable doubt that defendant Abraham aided and abetted defendant Goldfarb in either willfully engaging in the ownership, operation, or conducting or carrying on of gaming operations of the Aladdin Hotel and Casino without a license from the Nevada Gaming Authorities to do so, or in aiding and abetting the defendant Goldfarb in willfully concealing his ownership, operation or conducting or carrying on of gaming operations of the Aladdin Hotel and Casino from the Nevada Gaming Authorities for which he was not licensed; or both of these elements. (Appendix p. 1229)

Thus the district court instructed the jury on the unlawful activities; one based on the unlicensed operation of the Aladdin; the other based on concealment which found its origin in the court's construction of the Nevada Statutes and Gaming Regulations, especially 3.100. In our opinion these instructions were correct.

VI

Goldfarb contends that there was a variance between the allegations in the indictment and the evidence which resulted

in a judicial amendment of the indictment. Judge Feikens correctly dealt with these issues in his opinion denying post trial motions stating:

> It appears Goldfarb alludes to principles of variance and amendment. The two concepts are closely related. Variance refers to the failure of the government's proofs to conform to the indictment. A variance is not fatal to the prosecution unless the defendant could not reasonably have anticipated from the indictment what evidence would be presented at trial or unless the indictment is so vague as not to bar subsequent prosecution on the same offense. *United States* v. *Knuckles*, 581 F 2d 305, 309 311, (2nd Cir), *cert. denied* 99 S Ct 581 (1978); *United States* v. *Fruehauf Corp.*, 577 F 2d 1038, 1056 (6th Cir), *cert. denied* 99 S Ct. 349 (1978); *United States* v. *Dunn*, 577 F 2d 119, 123 (10th Cir 1978); *Watson* v. *Jago*, 558 F 2d 330, 333-334 (6th Cir 1977); *United States* v. *Maselli*, 534 F 2d 1197, 1201-1202 (6th Cir 1976). A variance is not ground for reversal unless the defendant's substantial rights are abridged. *United States* v. *Berger*, 295 U.S. 78, 82 (1934). In this case I find no prejudicial variance.
>
> The apparent amendment claim needs more analysis, but it too is without merit. It is settled since *Ex Parte Bain*, 121 U.S. 1, 10 (1887) that neither the court nor the prosecutor may substantially change the indictment to "suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes . . ." This is in keeping with the principle that a court may not establish standards of conduct upon pain of imprisonment; such is the legislature's domain. An amendment to the indictment is *per se* reversible error. *United States* v. *Crocker*, 568 F 2d 1049, 1059 (3rd Cir 1977), *United States* v. *Fruehauf*, *supra*, at 1056. An amendment may be express or "constructive" (effective). *Id.* In determining whether there has been a constructive amendment

inquiry should focus on whether any essential element of the crime was proved by facts different than those alleged. *Stirone* v. *United States*, 361 U.S. 212 (1960). Thus, if the indictment alleges one sort of false testimony but the government is permitted to prove another sort, false testimony being necessary for conviction, an amendment has occurred. *United States* v. *Crocker, supra.* Similarly, in a Hobbs Act case, if a grand jury alleges one sort of interstate nexus while proof and argument show another, an amendment has occurred. *Stirone* v. *United States, supra. See United States* v. *Prejean*, 494 F 2d 495, 497 (5th Cir 1974); *United States* v. *Vesaas*, 586 F 2d 101, 103 (8th Cir 1978).

In this case, there were three elements the government was required to prove: (1) the use of an interstate facility; (2) actual or attempted promotion, etc. of an unlawful activity; (3) specific intent. *United States* v. *Prince*, 529 F 2d 1108, 1112 (6th Cir), *cert. denied* 429 U.S. 838 (1976). The proofs did not diverge from the course established by the requirement of these elements. The only apparent argument available to Goldfarb (and the other Defendants) is that the grand Jury did not pass upon the exact shape of the illegal acts in Nevada, which it is their constitutional right to have done. I find this contention without merit. The grand jury needed to know enough of the Nevada gaming laws to make the indictment sufficient, which it did. My interpretation of Nevada gaming law presented Defendants with no new factual charges that they were required to meet, to use variance phraseology, nor did it allow either proof or argument of a new factual basis for any element of the crime, to use amendment terminology. Moreover, the allegation as to the Nevada offense was broad enough to include the specific crime I have already explained. It has often been held that one way to guard against a constructive amendment claim is to draft an indictment with generality. *United States* v. *Crocker, supra*, at 1059, so long as it contains the necessary specificity.

VII

We find no prejudicial error in the court's denial of Abraham's motion to declare a mistrial because of improper cross-examination of a character witness. One of the character witnesses was General Ralph G. Taylor retired from the United States Air Force. Attempts were made by Abraham's attorney to introduce into evidence Abraham's gallantry as an officer and pilot, his two tours in Vietnam and his communications with the White House. The court excluded such evidence. We agree that it was not admissible except upon conviction to be considered in mitigation of the sentence. Error was assigned as to the cross-examination of the character witness Lovell, a former city attorney in Las Vegas, who volunteered that Abraham enjoyed a good reputation with Nevada's "law enforcement community." He was asked upon cross-examination whether he had heard that in order for a shop or store to do business with Aladdin Hotel Corporation to obtain store space in the area that payments were made personally to Abraham, not to the corporation. Lovell answered, "No, I don't know that." Before asking the question, at a side bar conference with the court not in the presence of the jury, the government produced evidence showing justification namely, the cancelled check and the court permitted the question to be answered and gave proper instruction to the jury as to its purpose. Further proceedings developed thereafter including rebuttal and surrebuttal evidence and when it appeared to everyone that this was creating a trial within a trial, the government moved to withdraw the question, in which counsel for Abraham joined. The trial court granted the motion finding that ". . . the spirit of *Michelson* v. *United States*, 335 U.S. 469 (1948) had been observed and the prejudice, if any, was dissipated in Abraham's favor." App. 452, 453. We find no abuse of discretion on the part of the District Judge in his handling of these issues.

Abraham and Monazym assign error because the trial court

held certain *in camera* proceedings to which they were not admitted. Abraham and Tamer assign error in the admission of evidence of tape recorded conversations and documents tending to prove that Goldfarb and Tamer used their influence with Leonard, the Prosecuting Attorney of Genesee County in local court proceedings which Tamer believed would assist him in securing a license in Nevada.

A special Grand Jury sought to return an indictment against Mr. Leonard which was not signed by the United States Attorney. Chief Judge Kennedy who conducted the *in camera* proceeding, wrote an opinion ordering the files sealed. The trial judge ordered that the defendants who had not participated in the *in camera* proceedings be given access to them.

The government had issued a subpoena for the testimony of Mr. Leonard but obtained a stipulation from all defense counsel which obviated the necessity for its production.

We find no abuse of discretion on the part of the trial judge nor any prejudice to Abraham and Monazym (See Opinion Denying Post Trial Motions, (App. 456)), nor was there any abuse of discretion in denying the motions for a severance or Tamer's motion to suppress evidence.

VIII

Appellant Monazym challenges the sufficiency of the evidence to support his conviction by the jury. The evidence is detailed by the District Judge in his Opinion Denying Post Trial Motions. (App. 449, 450). The evidence and the inferences to be reasonably drawn therefrom must be viewed in the most favorable light in favor of the government. *Glass* v. *United States*, 315 U.S. 60 (1942); *United States* v. *Dye*, 508 F. 2d 1226 (6th Cir. 1974); *United States* v. *Green*, 548 F. 2d 1261 (6th Cir. 1977). So viewed, we are of the opinion that the verdict of the jury is supported by abundant evidence. In our opinion, the indictment charged only a single conspiracy.

IX

Aladdin contends that the district court erred in denying its motion for a severance. It alleges that it could not defend itself except through the testimony of its alleged agents, who, as defendants in this joint trial, had countervailing Fifth Amendment rights not to testify.

The trouble with this argument is that the proof at the trial showed that conspiratorial acts were committed by at least six other officers, agents and employees of Aladdin who were not defendants. Aladdin did not call any of them to testify in its behalf. No showing was made by Aladdin that any of its officers, agents or employees were willing to testify in its behalf or exculpate it. There was no showing that in separate trials any defendant would waive his Fifth Amendment privilege.

This matter was addressed entirely to the sound discretion of the district court. Aladdin had a heavy burden to overcome which it was unable to do. *Cf. United States* v. *Vigil*, 561 F. 2d 1316 (9th Cir. 1977).

Conclusion

The judgments of conviction are affirmed.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 79-5318

UNITED STATES OF AMERICA
Plaintiff-Appellee

-v-

JAMES ABRAHAM
Defendant-Appellant

APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

PETITION FOR REHEARING

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INTRODUCTION

JAMES ABRAHAM, petitions this Court to grant a rehearing of his cause.

As grounds for re-hearing, Abraham submits the following:

The March 5, 1981 panel opinion in this case omits a crucial issue presented in Abraham's Brief, and misapprehends certain central facts controlling other issues.

Specifically:

1. Abraham's contention — that the evidence against him, viewed as a whole and cast in the light most favorable to the government, is insufficient to sustain the jury's verdict of guilty against him — is misconceived by this Court;

2. There is a misapprehension of the manner in which the improper cross-examination of defense witness Carl E. Lovell, Jr. was conducted, and thus the real prejudicial effect, and the confusion and bias it caused in the jurors' minds remains unconsidered by this Court;

3. The prejudice to Abraham in the trial court's refusal to grant a severance was not recognized by this Court;

4. All other issues raised in the Petition For Rehearing filed in this case on behalf of Defendant-Appellants Tamer, Goldfarb, Monazym and the Aladdin Hotel Corporation, which Abraham incorporates herein and adopts by reference as if fully set forth.

Abraham's contentions have been erroneously meshed with those raised by others from whom he has continuously sought severance for fear of just this result. We have set out below in more detail those issues we request this Court rehear. Abraham, in his Brief on Appeal, sets forth issues discrete from those who were also tried and convicted with him.

SUFFICIENCY OF THE EVIDENCE

As the Opinion observes, defendant Goldfarb conceded that the sufficiency of the evidence against him was not in issue. Abraham not only did not join in such concession, but at appropriate times during the course of the trial and in Point I of his Brief specifically raised the issue of insufficiency of the evidence.

Central to the thrust of each and every issue Abraham raises in his Brief is his contention that the evidence against him lacked the quantum of proof necessary to sustain a guilty verdict. We invite this Court to reassess Abraham's Brief at pages 21-37, in which the evidence produced against him is set forth in detail. No untainted, objective jury could reasonably base a finding of guilt upon such evidence.

Abraham's conviction rests upon evidence that he extended credit and complimentary privileges ("comps")

as part of his duties and responsibilities as a key employee of the Aladdin Hotel Corporation. All records and financial entries reflecting such activities, as required by law, were retained and available for review. Absent is any evidence whatsoever of an illegal intent.

Jeffrey Silver, a witness called by the government, testified that the Nevada Gaming Commission recognized the widespread, well-accepted method of promoting business by the use of credit extensions and "comps," and left the decision of how and when such promotional methods should be used to the casino owners and certain employees. (See Abraham's Brief, pages 4-8 and 26-27.) Abraham did not abdicate his authority in these matters to anyone, nor did he take orders from either defendant Tamer or Goldfarb. (See Abraham's Brief, pages 27-31.) The record affirmatively demonstrates that all financial records and entries required by law were kept, and there was no concealment of extensions of credit or complimentary privileges from the authorities. (See Abraham's Brief, page 28.)

Standing alone and untempered by improper innuendo, as is demonstrated in the government's improper cross-examination of Mr. Lovell and the baseless accusations therein contained, this evidence would have been insufficient to cause a reasonably-minded jury to convict. We ask this Court to grant rehearing in order that it may review this evidence and determine if an innocent man has been found guilty.

THE IMPROPER CROSS-EXAMINATION OF CARL E. LOVELL, JR.

There has been a misapprehension about the manner in which the government's improper cross-examination of defense witness, Carl E. Lovell, Jr., was handled by the trial court. (March 5, 1981, Opinion, at page 21.) Thus, we set out below a summary of the trial proceedings in this regard, and request that rehearing be granted on this issue.

The government announced, at sidebar, (Tr. 3239) its intention to inquire upon cross-examination of defense character witness, Carl E. Lovell, Jr., whether he knew about a check made payable to Abraham which it alleged represented a "bribe" to shopkeepers for the granting of leased space at the Aladdin. Vigorous objections and legal arguments were advanced by Abraham's counsel on February 20, 1979, at sidebar (Tr. 3239-3243) and later in chambers (3272-3276, and 3288-3330). In addition, on February 21, 1979, the court heard additional legal argument (Tr. 3338-3356) and allowed the government to voir dire Mr. Lovell, outside the hearing of the jury (Tr. 3356). This voir dire disclosed that Mr. Lovell would testify that he did not know nor had he heard that payments were made to Abraham personally in exchange for the granting of leases to shopkeepers at the Aladdin. (Tr. 3357-3358). Abraham's counsel advanced further legal argument in objection to the introduction of this evidence (Tr. 3359-3379). Defense counsel announced to the court at this time that, during the previous 12 hours he was able to ascertain the true state of affairs regarding this check (Tr. 3368), matters to which Mr. Lovell would be incapable of testifying. Nevertheless,

without any further basis in fact than the mere existence of a $1,000 check to Abraham, and notwithstanding that the court already knew that Lovell was totally without knowledge of the check or Abraham's relation to the check, the court allowed the government to ask this inflammatory and provocative question in the presence of the jury (Tr. 3386):

> Q. Then I will ask you did you know or have you heard that in order for a shop, or store to do business with the Aladdin Hotel Corporation, that is, to lease space from the Aladdin Hotel Corporation for a shop or a store inside the casino and hotel area, that payments were made personally to Mr. Abraham, not to the Corporation, in exchange for getting that space?

Abraham's counsel moved for a mistrial (Tr. 3388). The motion was denied (*id.*).

The following day, which was the third day which had been consumed by this matter (this alone speaks to the crucial nature of this evidence as viewed by the court and counsel), the government made a proffer to the court outside the hearing of the jury of further testimony by a witness named Ray Warren upon the subject of Abraham's alleged misconduct in extending leases for space. (Tr. 3436-3452). By this time, defense counsel was able to present two witnesses, Messrs. Johnson (Tr. 3467-3477), and Saputo (3477-3489), whose testimony was also heard by the court outside the hearing of the jury, and both of whom had personal knowledge of the events leading up to and concerning the payment and disbursement of the $1,000 check.

That is, (1) the check was not generated for Abraham's gain; (2) the check was for payment to Aladdin Hotel personnel in settlement of claims which they believed they had arising from the new ticketing operation; and (3) it was within Abraham's scope of responsibility to bring about the leasing of the ticketing agency and the settlement of the claim. Once this testimony was heard, it became evident that the government's theory that this $1,000 was a "bribe" was without basis in fact. It was for this reason that the government moved to strike its question (Tr. 3492), and not because "it appeared to everyone that this was creating a trial within a trial." (March 5, 1981, Opinion, at page 21)

This question encompassed an allegation far more personally inculpating than any of the evidence introduced in the government's case in chief. Mr. Lovell's response, "No, I don't know that," (*id.*) could not overcome the effect of such a statement nor erase the apparent, to the jury, good faith basis for the question. The Opinion presumably assumed that the prejudicial sting of this question was adequately dissipated by "[f]urther proceedings . . . including rebuttal and surrebuttal evidence" which disclosed the utter baselessness of this question. A request that the jury be allowed to hear this evidence was denied. (Tr. 3490) All that the jury ever heard was the startling and defamatory question, and some two days later a one sentence statement by the trial judge that the question had been withdrawn by the government. Thus, the jury was left by the court's silence to ponder upon the full extent of Abraham's requests for bribe money. Once it appeared that Lovell had no knowledge of this affair, and again when it appeared the government had asked this question without good faith support, a mistrial should have been granted.

The Opinion further erroneously concludes that Abraham's counsel "joined" the motion to strike and asked for no further relief. (March 5, 1981, Opinion, page 21). However, counsel both moved twice for a mistrial (Tr. 3388 and 3492-3493) and after these motions were denied (Tr. 3388 and 3493), requested the following curative instruction (Tr. 3495):

> I instruct you that the final series of questions Mr. Hunterton asked of Mr. Lovell concerning the payment allegedly made to Mr. Abraham by persons seeking space at the Aladdin Hotel has been withdrawn at the request of the government. I have conducted a hearing and I heard witnesses and found — . . . that there was no basis for those questions.

This request was also denied. (*Id.*).

Instead of so instructing the trial judge merely told the jury (Tr. 3500) that the question was withdrawn and should be disregarded. The jury was never told why — that the question had no factual foundation whatsoever.

This one question — so highly inflammatory — was enough to tip the scales improperly and unjustly against Abraham. Innocuous testimony and exhibits were transformed into evidence of guilt. Thus, the trial judge abused his discretion in allowing its admission, and thereafter in denying Abraham's motions for mistrial or a curative instruction.

What the Fifth Circuit had to say in the case of *United States v. Beechum*, 582 F.2d 898, 914 (5th Cir.

1978) (*en banc*), about the effect of such collateral evidence is highly applicable:

> One of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic evidence. *See*, Note, *Other Crimes Evidence At Trial:* Of Balancing and Other Matters, 70 Yale L.Rev. 763, 773 (1961). This danger is particularly great where, as here, the extrinsic activity was not the subject of a conviction; the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged. Moreover, "[e]ven if the jury is no more disposed to punish the accused for his unpunished past crimes, 'over-persuasion' may lead them to conclude that, having committed a crime of the type charged, he is likely to repeat it." *Id.* It is fear that the jury would draw just this inference that extrinsic offense evidence is excluded when it is relevant solely to the issue of the defendant's character.

See, also, United States v. McFadyen-Snider, 552 F.2d 1178, 1183 (6th Cir. 1977); *United States v. Ailstock*, 546 F.2d 1285, 1289 (6th Cir. 1976); *United States v. Largent*, 545 F.2d 1039, 1043 (6th Cir. 1976) *cert. denied* 429 U.S. 1098 (1977); *United States v. Faulkner*, 538 F.2d 724, 728 (6th Cir.) *cert. denied* 429 U.S. 1023 (1976); *United States v. Semak*, 536 F.2d 1142, 1144 (6th Cir. 1976); *United States v. Rong*, 513 F.2d 1001, 1004 (6th Cir. 1975).

We request this Court grant a rehearing in order that it may correct its erroneous reading of the record on this point.

REFUSAL TO SEVER

The introduction of the separate alleged misconduct of Tamer and others in seeking to induce public officials to expunge his criminal record had a decided and irrevocable effect upon Abraham's right to a fair trial. This misconduct was exhaustively explored by the government during the trial (Abraham Brief, pages 37-43), and amounted to full proof of a completely separate conspiracy in which Abraham had no part. Rule 14, Federal Rules of Criminal Procedure, and *Kotteakos v. United States*, 328 U.S. 750 (1946), dictated the granting of Abraham's motion for severance, and the trial court's denial of this motion was reversible error.

The March 5, 1981, Opinion disposes of this issue in one sentence and by accumulating Abraham's objection with that of a co-defendant.

We entreat this Court to grant rehearing on this issue so that it may consider Mr. Abraham's objections to this evidence (set forth in Abraham's Brief, at pages 37-45) within the context of its impact upon him alone. Further, if this issue is viewed in conjunction with the insufficiency of the evidence, the prejudice Abraham suffered by a joint trial is inescapable, and it becomes apparent that its effect was to bias the jury to render an improper verdict against him.

CONCLUSION

For all of the forthgoing reasons, Appellant JAMES ABRAHAM requests this Court enter an order setting this cause down on its calendar for rehearing.

Respectfully submitted,

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PROOF OF SERVICE

I HEREBY CERTIFY that one copy of the foregoing Petition For Rehearing was mailed to the following on this 18th day of March, 1981.

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APPENDIX D

[FILED APR 1 1981]

Nos. 79-5255, 79-5317, 79-5318, 79-5319, 79-5320

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America
Plaintiff-Appellee

v.

Charles Goldfarb, James Tamer,
James Abraham, Edward Monazym,
and the Aladdin Hotel Corporation
Defendants-Appellants

ORDER

Before WEICK, LIVELY and BROWN, Circuit Judges.

Upon consideration of the petitions for rehearing in which all of the appellants joined and also the separate motion for rehearing filed by Appellant Aladdin Hotel Corporation, we are of the opinion that the issues in these appeals were adequately treated in our signed opinion and that said petition for rehearing and motion for rehearing lack merit.

It is therefore ordered that the petition for rehearing and the separate motion for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

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